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In The  
Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

*Petitioner,*

v.

MARCUS E. COLLINS AND THE  
GEORGIA DEPARTMENT OF REVENUE,

*Respondents.*

On Writ Of Certiorari To The  
Supreme Court Of Georgia

BRIEF OF ALABAMA, ARIZONA, FLORIDA,  
HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS,  
LOUISIANA, MINNESOTA, MISSOURI, MONTANA,  
NEW HAMPSHIRE, NEW JERSEY, NORTH  
DAKOTA, OKLAHOMA, PENNSYLVANIA,  
TENNESSEE, TEXAS, UTAH, VERMONT,  
WASHINGTON, WISCONSIN AND VIRGINIA AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE

This brief in support of Georgia is submitted on behalf of Alabama, Arizona, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, New Hampshire, New Jersey, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin and Virginia pursuant to Supreme Court Rule 37.

The Court's decision five years ago in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), triggered suits for tax refunds in twenty-four states. In *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510, 2519 (1993), the Court held that, while *Davis* applied retroactively under federal law, tax refunds were not necessarily required under federal law. The Court remanded *Harper* to the Supreme Court of Virginia for the express purpose of allowing the state court to determine whether the state provides its taxpayers an adequate opportunity to challenge the validity of a tax prior to payment. The Court also remanded cases presenting the same issue to the courts of Georgia, Montana, New York, North Carolina and South Carolina. *Reich v. Collins*, 263 Ga. 602, 437 S.E.2d 320 (1993), is the first of the remanded cases to reach final decision in a state court on the question of the adequacy of a state's pre-deprivation remedies. The Georgia Supreme Court held in *Reich* that "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." 263 Ga. at 604, 437 S.E.2d at 322.

The issues presented in this case reach far beyond the litigation generated by *Davis* and threaten to disrupt each



and every state's system for the assessment, enforcement, collection and refund of taxes. Each state legislature establishes its own system of tax collection and refund procedures based on obtaining a fair balance between providing taxpayers an adequate opportunity to contest a tax assessment and providing the state the means to collect and to retain the revenues necessary to operate. If the Court does not recognize fully states' need to have both the means to enforce payment of taxes and the ability to limit refunds of taxes paid, states will be unable to collect needed revenues and to rely on the stability of their revenue collections.

For the above reasons, Amici States have a direct and abiding interest in the issue now before this Court.

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### SUMMARY OF ARGUMENT

This case presents another opportunity for the Court to answer the question presented in some form in four cases decided by the Court in the past four years: *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); and *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). The question is to what extent the Due Process Clause of the United States Constitution imposes an obligation on states to refund taxes alleged by a taxpayer to be unconstitutional.

This Court has stated clearly in two of those recent decisions that if a state offers taxpayers a meaningful

opportunity to challenge a tax assessment prior to payment, this procedural safeguard is "sufficient by itself to satisfy the Due Process Clause." *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21. This statement acknowledges a state's need to rely on the presumptive constitutionality of its tax statutes and on the revenues collected in good faith under those statutes. Otherwise, all revenues collected are only conditionally in the state's treasury. The state is exposed to the constant threat of disruption to its fiscal stability. As this Court has recognized, states may avoid that threat by establishing adequate pre-deprivation remedies for invalid tax assessments.

In reality, however, that option does not exist if the pre-deprivation remedies must satisfy a due process standard that prevents the state from including within its system procedures to enforce the collection of taxes. To suggest, as Petitioner does in this case, that no pre-payment procedure is "meaningful" under due process analysis unless the procedure exposes the taxpayers to no risks or sanctions establishes a due process standard that is impossible for states to satisfy without relinquishing their ability to enforce the collection of taxes. The result is to make meaningless the Court's pronouncements in *McKesson* and in *Harper*.

Finally, each state must be allowed the flexibility to establish a tax collection and refund system that, viewed as a whole, satisfies federal constitutional standards. In the cases decided in the past four years, the Court repeatedly has acknowledged the authority of the state courts, in the first instance, to determine remedial issues in state tax cases. *American Trucking Ass'ns v. Smith*, 496 U.S. at



206 (Stevens, J., dissenting); *Beam*, 111 S. Ct. at 2448; *Harper*, 113 S. Ct. at 2520. The policy supporting this deference to the states is clear. Each state's system is unique, and its constitutional sufficiency is not dependent on the inclusion or exclusion of specific components or on how it compares to another state's system. There is no federal requirement that each state provide the same remedial process; the only requirement is that each state provide remedial procedures that satisfy the minimum demands of federal due process. Amici States urge the Court, as it decides what constitutes the minimum required due process in tax cases and whether Georgia's system satisfies this minimum, to acknowledge that each state retains flexibility to enact its own system and to determine, in the first instance, whether the system affords due process.

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### ARGUMENT

#### I. To Maintain Financial Stability, States Should Be Able to Extinguish Post-Deprivation Liability to Refund Taxes by Providing Adequate Pre-Deprivation Relief.

A United States Supreme Court decision declaring a state tax unconstitutional may expose states throughout the nation to an unanticipated past liability, possibly totaling billions of dollars. Virginia alone is exposed to a potential liability of \$707 million as a result of this Court's ruling in one case, *Davis v. Michigan*.

The Court has recognized the harm caused if states are not allowed to rely in good faith on the presumptive

constitutionality of their tax statutes and the revenues they generate, but must endure the constant threat of financial disruption caused by post-deprivation remedial relief. States may avoid this threat by providing adequate pre-deprivation remedies. Giving taxpayers a meaningful opportunity to challenge a tax assessment prior to payment is a procedural safeguard "sufficient in itself to satisfy the Due Process Clause" of the United States Constitution. *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21.

This result is fair to both the taxpayer and the government. A taxpayer has an opportunity to contest the validity of a tax and, if he fails to do so before paying it, must be content with future relief. If the taxpayer fails to contest the validity of the tax before paying, the state may rely on the revenues collected in good faith reliance on its tax statutes. The taxpayer has a choice; the state has a choice.

If, in giving taxpayers this option, however, the state cannot also include reasonable methods in its tax system to enforce the collection of taxes in general, the choice provided the state is illusory. No state will be able to comply with a pre-deprivation due process standard that ties the government's hands and prevents it from collecting validly assessed taxes. If that standard is applied, states' only choice will be either to forego effective and expeditious tax collection or to provide post-deprivation relief. This result makes meaningless the Court's pronouncements in *McKesson* and in *Harper*.

## II. The Due Process Standard Applicable to Pre-Deprivation Tax Remedies Should Consider the Legitimate Interest of the States to Enforce the Collection of Taxes.

Of particular concern to the states in the recent retroactivity cases before the Court has been the effect of a federal decision declaring a state tax unconstitutional on a state's obligation to provide retroactive remedial relief. It is clear from the cases that, "[s]ubject to possible constitutional thresholds," the remedial effect under state law of a retroactive federal decision is governed by state law. *Beam*, 111 S. Ct. at 2443. The constitutional threshold to which states are subject is the requirement to "provide procedural safeguards" that "satisfy the commands of the Due Process Clause." *McKesson*, 496 U.S. at 36-37. Thus, while states are free to establish their own remedial procedures, "federal law sets certain minimum requirements." *American Trucking Ass'ns v. Smith*, 496 U.S. at 178-79.

It is also clear that a state may satisfy its constitutional obligation to provide taxpayers with adequate procedural safeguards in two ways, through a pre-deprivation process or through a post-deprivation process. Federal due process does not require states to provide both; an adequate pre-deprivation process alone is sufficient. *Harper*, 113 S. Ct. at 2519; *McKesson*, 496 U.S. at 38 n.21. The choice of whether to provide pre-deprivation or post-deprivation due process is left to the states.<sup>1</sup>

<sup>1</sup> Petitioner suggests that Georgia's pre-deprivation procedure was not "clear and certain" because a post-deprivation refund procedure was also available. Brief for Petitioner at 27

The remaining question, presented in this case, is what type of pre-deprivation process satisfies the minimum demands of federal due process in state tax cases. While this precise issue may be new, the Court's approach to due process issues is firmly grounded in precedent. This precedent requires a balancing of the interests at stake in each particular case.

### A. Due process is a flexible standard that is based on a balancing of the interests at stake.

Due process is founded on notions of fundamental fairness. *Wolff v. McDonnell*, 418 U.S. 539 (1974). It is not a concept to be determined formalistically; rather, the specific dictates of due process vary with each factual situation. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (due process requirements depend on analysis of all relevant factors); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (very nature of due process negates any concept of inflexible procedures universally applicable to every situation). Once it is determined that due process applies, the question remains what process is due under the circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Deciding whether procedures are constitutionally sufficient requires courts to balance the governmental and

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("Regardless of the merit of any other remedy, the purported availability of the refund statute made Georgia's entire remedial scheme unclear and uncertain."). There is no federal requirement that a state choose between pre-deprivation and post-deprivation procedures. While a state must provide one or the other, nothing prohibits it from offering both. See *McKesson*, 496 U.S. at 52 n.36 (state law may provide relief beyond demands of federal due process).



private interests involved in each case. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

This balancing process naturally leads to different results under different facts, as seen by comparing the facts and the results in *Goldberg v. Kelly*, 397 U.S. 254 (1974), with those in *Mathews v. Eldridge*. In *Goldberg*, the Court considered whether a welfare recipient was entitled to an evidentiary hearing before termination of benefits. The Court held that the governmental interest in protecting public funds did not, under the facts, outweigh the welfare recipient's "brutal need" for continuing benefits. 397 U.S. at 261. Accordingly, the recipient's right to object in writing before termination was held not sufficient under due process; a hearing was required.

The issue in *Mathews* was whether the Due Process Clause likewise required an evidentiary hearing before termination of Social Security disability benefits. Both the district court and the circuit court of appeals held that, based on *Goldberg*, due process required such a hearing. The Supreme Court disagreed, holding that, in this instance, the opportunity for the recipient to submit written objections satisfied due process. Unlike the welfare recipients in *Goldberg*, the recipients of disability benefits could show no "brutal need" for the continuation of benefits, pending a final determination, that would offset the government's interest in denying benefits to potentially ineligible recipients.

Generally, since *Mathews*, the federal courts have engaged in a balancing of specific facts to determine whether a pre-deprivation remedy is required, and

whether the remedy is adequate. The facts to be considered are

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.

In the case before us, the governmental interest to be weighed is the ability of the states to include within their tax collection, enforcement and refund systems reasonable sanctions and penalties to enforce the collection of taxes and other limits on the form of pre-deprivation relief available. States' fiscal stability indisputably depends on their ability to collect taxes and on their ability to retain the taxes collected.

**B. States must be able to include financial sanctions within their pre-deprivation process in order to enforce the collection of validly assessed taxes.**

In *Harper*, the Court noted the *McKesson* holding that a state incurs an obligation to provide meaningful backward-looking relief when it "places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality." 113 S. Ct. at 2519 n.10, quoting

*McKesson*, 496 U.S. at 31. The Court further suggested how the *McKesson* post-payment standard might apply in the pre-payment context:

A State that "establish[es] various sanctions and summary remedies designed" to prompt taxpayers to "tender . . . payments *before* their objections are entertained or resolved" does not provide taxpayers "a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity."

*Id.* at 2519-20 n.10, quoting *McKesson*, 496 U.S. at 38.

Based on this footnote in *Harper*, Petitioner argues that any financial sanction in a state tax system that "prompts" or "encourages" taxpayers to tender tax payments constitutes "duress." According to Petitioner, if a state chooses to give taxpayers a pre-deprivation process, the process does not satisfy the minimum constitutional demands of due process unless a taxpayer may use that process without risk, even if he loses and even if his claim is without merit. In other words, the state must not only give the taxpayer a remedy; it must also guarantee the taxpayer's success in obtaining that remedy. This cannot be correct. Surely, due process does not place such an onerous burden on the states and grant taxpayers such a magnanimous benefit.<sup>2</sup>

<sup>2</sup> A prime example of this unbalanced view is found in the Brief Amici Curiae of the National Association of Retired Federal Employees ("NARFE"), *et al.*, at 13, at which Amici argue

Most tax assessment statutes are without question constitutionally valid, and most tax systems contain sanctions against taxpayers who fail to pay tax assessments in a timely manner. These sanctions are not "designed" to coerce taxpayers into paying their taxes before any objections to the validity of the tax will be "entertained or resolved." They are designed to enable states to enforce collection of validly assessed taxes. The argument that these mechanisms place such "duress" on taxpayers that they are compelled to pay first and complain later fails to take into account the legitimate interest of the states in "prompting" or "encouraging" taxpayers to pay *valid* tax assessments. The absence of such mechanisms would deprive states of the timely receipt of necessary revenues and would invite frivolous challenges to tax assessments. A proper balancing of interests must give substantial weight to the states' interest in enforcing the collection of valid taxes.

Moreover, the argument that the possibility of financial sanctions for nonpayment creates "duress" is flawed on several grounds. Under Georgia law (and that of numerous other states), a taxpayer may bring a pre-deprivation declaratory judgment action to contest the validity of a tax statute. If that action is resolved before the taxes are due, as will often be the case if the taxpayer acts promptly and directly instead of waiting for a court

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that for a state's pre-deprivation procedures to satisfy federal due process, the procedures must

*guarantee* the taxpayer that if he pursues this route, he will be immune from all criminal and economic sanctions, including penalties, liens, seizures of property, and above market interest, *regardless of whether he loses.*



ruling that a similar tax statute in another state is invalid, there is no possibility of financial sanctions or any other risk.<sup>3</sup> Further, even if the action is not resolved prior to the date the taxes are due, there will be no financial sanctions for delayed payment if the taxpayer ultimately succeeds in his challenge, because there can be no penalty or interest charged if the tax was never owed. Petitioner in this case wants more. He wants to be allowed not to pay a tax when due, challenge the validity of that tax, lose his challenge, and, only then, to pay the tax with no penalty or interest. This demand is unreasonable and would seriously undermine legitimate state efforts to collect valid taxes. Taxpayers could, without risk, postpone the timely payment of taxes by instituting a challenge, no matter how unfounded or frivolous. The taxpayer would have nothing to lose. All of the risk would be placed on the taxing entity, despite the fact that tax statutes carry a presumption of legal validity and tax officials presumptively act in good faith. This result would be disastrous.

The essential question in assessing the adequacy of pre-deprivation procedures is whether the procedure

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<sup>3</sup> Even assuming, which is so unlikely as to be unbelievable, that a state would institute criminal proceedings against a taxpayer asserting a good faith challenge to a tax statute, there can be no criminal sanctions for not paying a tax that is not yet due and payable. Petitioner appears to be arguing that the existence of any sanctions necessary to collect taxes from recalcitrant taxpayers makes the entire pre-deprivation procedure coercive, although there is no indication that any of these sanctions would be applied in a legitimate, good faith challenge to the validity of a tax assessment.

gives taxpayers a "fair" opportunity to contest the validity of a tax before payment and the "clear and certain" remedy of not having to pay a tax that is declared invalid. *McKesson*, 496 U.S. at 39.<sup>4</sup> A "meaningful opportunity" does not mean a totally risk-free procedure for challenging a tax assessment. Imposing penalties and interest on a taxpayer who fails to prevail on the merits of his claim is not the constitutional equivalent of a procedural bar against filing such a claim. The possibility of increased cost from having to pay an obligation later is simply an

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<sup>4</sup> *McKesson* states that due process requires (1) a meaningful opportunity to be heard and (2) the availability of a clear and certain remedy. 496 U.S. at 39. Petitioner misreads this statement. Petitioner does not argue that the remedy of being relieved of having to pay a tax declared unconstitutional was not clear and certain. Rather, Petitioner argues that the procedures provided are not clear and certain because they contain some risks or uncertainties. Brief for Petitioner at 17-26. The fact that a procedure contains some inherent risk should the applicant not prevail in his challenge or that an applicant must make decisions regarding which of several procedures to utilize cannot result in the procedures themselves not being meaningful. A procedure is meaningful under due process if it provides a fair opportunity to be heard. Georgia law provided Petitioner ample opportunities to be heard prior to payment of the tax. Petitioner further argues that because Georgia provided a "clear and certain" post-deprivation remedy under its refund statute, thus giving taxpayers the option to postpone a challenge until after payment, its entire remedial scheme was "unclear and uncertain." Brief for Petitioner at 27. This argument is contrived. That Petitioner was himself "unclear" or "uncertain" which procedure to choose cannot be blamed on any inadequacy in the procedures.

inherent risk of litigation. On the other hand, the assessment of penalties and interest is a necessary and altogether reasonable method for states to secure timely tax payments. A balancing of the competing interests under due process analysis must accommodate the states' vital interest in the payment and collection of tax revenues. *McKesson*, 496 U.S. at 37 n.19.

Moreover, to hold that the assessment of penalties and interest for the failure to timely pay a valid income tax constitutes "duress" would be contrary to this Court's established precedents. Essentially, duress is the payment of a tax under such coercion that the taxpayer in reality has no option but to pay the tax rather than challenge it. See *United States v. Mississippi Tax Comm'n*, 412 U.S. 363, 368 n.11 (1973) (duress consists of sanctions so substantial as to realistically give the taxpayer "no choice at all"). The Court has consistently found duress only when the taxpayer would risk imminent seizure of property or the termination or serious disruption of business operations. See *United States v. Mississippi Tax Comm'n*, 412 U.S. at 368 n.11 (sanctions for nonpayment included forcing taxpayer to give up an entire line of business); *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 23 (1920) (choice between payment and loss of land); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 471 (1912) (penalties plus cancellation of right to do business and loss of right to relief); *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280, 286 (1912) (taxpayer subject to serious, if not fatal, impairments to its contracts and injury to its business).

Nothing so Draconian faces Petitioner in this case. The possibility that a taxpayer who unsuccessfully challenges the imposition of an income tax may be subject to

penalty and interest cannot realistically be viewed as the type of coercion that leaves the taxpayer "no choice at all." On the other hand, a state has a vital interest in incorporating within its pre-deprivation procedures means to enforce the timely payment of taxes. In fact, if a state cannot include such measures within its system, it is the state that is left with "no choice at all" in developing a pre-deprivation procedure that satisfies due process.

Ironically, Petitioner in this case argues that Georgia law coerces taxpayers into paying their taxes before challenging them, yet admits that he was not coerced into paying his own taxes before bringing this challenge. Petitioner has refused to pay any state taxes on his retirement income for taxable year 1988, admits that he has been deprived of no property for this non-payment, and cannot deny that he has received and continues to receive extensive "process" through both the state and federal court systems.<sup>5</sup> See Brief for Petitioner at 5.

Thus, while Petitioner here presents his question as one of pre-deprivation process, his actual argument is that Georgia's pre-deprivation process is inadequate to provide him post-deprivation relief for voluntarily paid taxes.<sup>6</sup> This argument is convoluted. Obviously, the clear

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<sup>5</sup> This is true despite the fact that the taxes due in April 1989 were for taxable year 1988, prior to the *Davis* ruling, with only the payment date delayed until April 1989. See *American Trucking Ass'ns v. Smith*, 496 U.S. at 186-87 (tax liability depends on date of occurrence of taxed transaction, not date for remittance of tax).

<sup>6</sup> In fact, as is clear from Petitioner's Statement of the Case, Petitioner took no action to contest the validity of the tax prior



and certain remedy available through a pre-deprivation process is relief from having to pay an invalid tax in the first place. Once the taxpayer voluntarily pays the tax, he cannot rely on state pre-deprivation procedures for a post-payment remedy. And he should not be allowed to rely on the federal courts for relief not available under federal law or under state law.

**C. Due process does not require that state pre-deprivation procedures expressly include suits for injunctive relief.**

In *Harper* and *McKesson*, the Court offered two examples of adequate pre-deprivation process: "authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment"; or "allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding." *Harper*, 113 S. Ct. at 2520, quoting *McKesson*, 496 U.S. at 36-37. While these remedies may indeed afford due process, due process also may be satisfied in other ways.<sup>7</sup> Requiring only those specific procedures would ignore the flexibility inherent in the concept of due process and would ignore the weight due

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to assessment or payment. See Brief for Petitioner at 2-9. The Statement details the procedures Petitioner followed *after Davis* and *after* the taxes were assessed, i.e., only post-deprivation procedures seeking refunds. Petitioner cannot properly assert that Georgia's pre-deprivation procedures were inadequate to provide him relief when he failed to pursue them *at the pre-deprivation stage*.

<sup>7</sup> In another extreme position, Amici NARFE, *et al.*, assert that the list of two provided in *McKesson* is exhaustive, whether the Court so intended or not. Brief for Amici NARFE, *et al.*, at 7.

the states' interest in collecting taxes and administering their tax systems.

While some states allow taxpayers to bring suits to enjoin taxes, the argument that allowing a taxpayer to bring such a suit is a requirement of adequate pre-deprivation relief misses the point.<sup>8</sup> The focus of the pre-deprivation inquiry is whether the taxpayers had a meaningful opportunity to challenge the validity of the tax before payment. Surely, an opportunity to challenge a tax is meaningful if through that procedure the taxpayer can receive full pre-deprivation relief from the payment of an unlawful tax. This opportunity may be provided in various ways, and a suit to enjoin the tax is not necessary for full pre-deprivation relief.

As discussed above, one way a taxpayer may receive full pre-deprivation relief is by a declaratory judgment action. A declaratory judgment by a court is a binding adjudication of the rights of the parties. Such a decision clearly prevents the state from collecting the tax, regardless of whether the state expressly allows suits to enjoin the collection of taxes.<sup>9</sup> If a taxpayer fails to take advantage of this available pre-deprivation procedure in a timely fashion and pays the tax without challenge, he

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<sup>8</sup> The general purpose of state anti-injunction statutes is to prohibit a taxpayer from waiting until taxes are delinquent and then filing a suit to enjoin the state from issuing a notice of deficiency or from taking steps to collect the delinquent taxes.

<sup>9</sup> For this reason Congress not only prohibits suits to enjoin the collection of federal taxes (26 U.S.C. § 7421(a)), but also excludes from the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, suits "with respect to Federal taxes." See *Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1974).

cannot then assert that due process also entitles him to post-deprivation remedial procedures. Whether the taxpayer is then entitled to post-deprivation relief is solely a matter of state law.

**D. Due process does not require that taxpayers be allowed to withhold payment of taxes pending state enforcement proceedings.**

The other pre-deprivation procedure suggested by the Court in *McKesson* and *Harper* is to allow a taxpayer to withhold payment of a tax and contest the validity of the tax as a defense in a state enforcement proceeding. This suggested procedure should not be interpreted to imply that, as a matter of pre-deprivation due process, a taxpayer may simply refuse to pay his taxes and wait for the state to bring a judicial enforcement or collection action, at which time the taxpayer may defend his refusal to pay by asserting the invalidity of the tax. Such a procedure shifts the burden from the taxpayer to challenge a tax statute in order to avoid payment to the state to justify its tax statutes before it may collect taxes. Traditional due process analysis does not require and does not support this result.

Placing this burden on the states distorts due process by giving excessive weight to the private interest of being able to challenge the validity of a tax prior to payment and by not balancing this interest against the governmental interest in establishing expeditious and reliable means to collect revenues. This beneficent grant to taxpayers also is in total conflict with the accepted principle

that state statutes carry a presumption of constitutionality. See *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). And, importantly, it ignores "the fiscal and administrative burdens" that such a procedural requirement would entail. *Mathews*, 424 U.S. at 335.

Requiring states to withhold their tax collections pending the result of a state judicial collection or enforcement proceeding would create fiscal and administrative burdens that would preclude most states from even contemplating such a system. Such a requirement could force states to create separate courts to hear tax claims, and the resulting delay in collecting revenues could well be fiscally impossible for many states.

In considering the adequacy of pre-deprivation procedures, this Court should consider the relative burdens alternate procedures would create. Surely, it is more unreasonable to burden states with the requirement to bring enforcement actions against any taxpayer who wishes to withhold payment, than it is to place the burden on the taxpayer to initiate a challenge to the validity of the tax before paying it.

Should a state choose to allow taxpayers to withhold payment of a tax and place the burden on the state to bring an enforcement action in court at which the taxpayer may assert the invalidity of the tax, a state is free to do so. Although such a procedure would satisfy due process, states should not as a constitutional matter be required to provide this procedure in lieu of other pre-deprivation remedies. The purpose of a pre-deprivation



remedy is to allow a taxpayer to challenge the validity of a tax before paying it. States may provide taxpayers various judicial or administrative procedures that permit this challenge before payment of the tax.<sup>10</sup> The focus of the inquiry is this: may the taxpayer receive relief from the obligation to pay the tax through the procedure provided. If so, due process has been satisfied.

### III. This Court Should Continue to Allow States Flexibility to Enact Tax Collection and Refund Systems that Satisfy the Minimum Demands of Federal Due Process.

Federal law clearly permits state interests to play a role in "shaping the contours of the relief" that a state affords to taxpayers illegally or erroneously taxed. See *McKesson*, 496 U.S. at 50. One state interest this Court expressly has recognized is "the Government's interest . . . in conserving scarce fiscal and administrative resources." *Mathews*, 424 U.S. at 348. Another, as the Court noted in *American Trucking Ass'ns v. Smith*, is the historic doctrine of federal-state comity:

While the relief provided by the State must be in accord with federal constitutional requirements, we have entrusted state courts with the initial duty of determining appropriate relief. . . . Our reasons for doing so have arisen from a perception based in considerations of federal-state comity. . . . In a case such as this, where a state court has addressed the refund issues, the same

<sup>10</sup> See, e.g., Ga. Code Ann. §§ 48-2-59 and 48-3-1 (1991), § 50-13-12 (1990).

comity-based perception that has dictated abstention in the first instance requires that we carefully disentangle issues of federal law from those of state law and refrain from deciding anything apart from questions of federal law directly presented to us. By these means we avoid interpreting state laws with which we are generally unfamiliar and deciding additional questions of federal law unnecessarily.

496 U.S. at 176-77. The majority in *American Trucking Ass'ns v. Smith* concluded that "[w]e are not, however, in a position to determine precisely the nature and extent of the relief to which petitioners are entitled for their . . . tax payments. That determination . . . lies with the state courts in the first instance." *Id.* at 200.

Most recently, in *Harper*, the Court held that

"a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." . . . [W]e leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia "is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements."

113 S. Ct. at 2519-20, quoting *McKesson*, 496 U.S. at 39-40, 51-52.

As discussed below, states have devised multiple systems of complex procedures to satisfy both federal due process requirements and their own need for certainty in fiscal planning.

**A. There is no federal requirement that each state provide the same remedial process.**

Because there is no one mandated means of providing due process and no requirement that each state provide taxpayers the same process, states enact their systems based on their specific needs and resources and on various policy decisions. The specific remedies created often are closely related to the procedures available to contest the taxes. For example, one state may require taxpayers to pay under protest and to pursue administrative relief to preserve their challenges, but may then make refunds mandatory when taxpayers prevail in those challenges. Another state may place few such procedural requirements on taxpayer challenges, but may limit the availability of refunds. One state may adopt a long statute of limitations in tax cases but may impose various procedural requirements. Another state may adopt a shorter statute of limitations but impose fewer procedural requirements. Moreover, each state's express statutory tax collection and refund procedures may be further limited or expanded by state court decisions interpreting those statutes.

The following summary illustrates some of the differences among states' current procedures for taxpayer challenges to tax assessments. Each of these listed procedures is only one component of the state's complete system.

1. **Injunctive Relief.** A number of states allow taxpayers to seek injunctions staying the

payment of contested taxes.<sup>11</sup> There are also a number of states, however, with statutes that specifically bar injunctive relief in most tax cases.<sup>12</sup>

2. **Declaratory Judgment Action.** Declaratory judgment actions are available to taxpayers in many states to challenge the validity of a tax.<sup>13</sup>

3. **Administrative Appeal Process.** A large number of states have established an administrative review process for taxpayers to protest the validity of taxes assessed.<sup>14</sup> Some of these administrative procedures require the taxpayer

<sup>11</sup> See, e.g., Ga. Code Ann. § 9-5-1 (1993); Kan. Stat. Ann. § 60-907 (1983); Miss. Code Ann. § 11-13-11 (1972); Mont. Code Ann. §§ 27-19-102, 27-19-103 (1993); Okla. Stat. Ann., tit. 12, § 1397 (1993). See also *Tully v. Griffin*, 429 U.S. 68, 76 (1976) (New York statutory and case law allows courts to award injunction in declaratory judgment actions challenging tax).

<sup>12</sup> See, e.g., Ariz. Rev. Stat. Ann. § 42-124(B)(1) (1991); Minn. Stat. Ann. § 289A.43 (West Supp. 1994); Va. Code Ann. § 58.1-1831 (1991).

<sup>13</sup> See, e.g., Ga. Code Ann. § 9-4-2 (1993); Kan. Stat. Ann. § 60-1701 (1983); Mont. Code Ann. §§ 27-8-101 through 27-8-206 (1993); N.Y. Civ. Prac. L. & R. § 3001 (West 1991); Okla. Stat. Ann. tit. 12, § 1651 (1993); Utah Code Ann. §§ 78-33-1 through 78-33-13 (1992); Va. Code Ann. § 8.01-184 (1992).

<sup>14</sup> See, e.g., Ariz. Rev. Stat. Ann. § 42-122 (1991) (exhaustion required); Ga. Code Ann. § 50-13-12 (1990); Kan. Stat. Ann. § 79-3226 (Supp. 1994) and § 74-2438 (1992) (exhaustion required); Minn. Stat. Ann. § 289A.65 (West 1992); Miss. Code Ann. § 27-7-71 (1991); Mont. Code Ann. § 15-1-211 (West Supp. 1994); Okla. Stat. Ann. tit. 68, §§ 207 and 221 (1992); Utah Code Ann. §§ 59-1-501 through 59-1-505 (1992); Va. Code Ann. § 58.1-1821 (1991); Wis. Stat. Ann. §§ 71.87 through 71.90 (West 1989).



to pay the tax before the administrative review, some require the taxpayer to post a bond, and still others allow the taxpayer to seek administrative review before paying the tax and without posting a bond. Some state statutes expressly prohibit their tax departments from taking any enforcement or collection actions while the administrative review is pending.<sup>15</sup>

4. Review by State Court. Taxpayers can, in most cases, obtain review by a state court of a contested tax assessment,<sup>16</sup> although some states require exhaustion of administrative remedies as a prerequisite. A number of states, including Arizona, Indiana, Maryland, Minnesota and Oregon, have established special state tax courts.

5. Refund Procedures. States also vary widely in their statutory procedures for refunds. In some states, no refund is available unless the tax was paid under protest or unless an amended return or request for refund is filed within a specified time period. Some states impose no preliminary restrictions on access to their refund procedure but impose other limitations on the award of refunds. In other states,

<sup>15</sup> See, e.g., Va. Code Ann §§ 58.1-1821, 58.1-1822 (1991).

<sup>16</sup> See, e.g., Ariz. Rev. Stat. § 42-124(B)(2) (1991); Ark. Const. art. 16, § 13 (1874) (illegal exaction action); Ga. Code Ann. §§ 48-2-59 and 48-3-1 (1991); Kan. Stat. Ann. § 74-2426(c)(3) (1992); Minn. Stat. Ann. § 271.10 (West 1989); Miss. Code Ann. § 27-7-73 (1991); N.Y. Tax §§ 681 and 690 (West 1987) and N.Y. Civ. Prac. L. & R. § 3001 (West 1991) and Art. 78 (West 1991); Okla. Stat. Ann. tit. 68, § 225 (1992); Utah Code Ann. §§ 59-1-601 through 59-1-608 (1992); Va. Code Ann. § 58.1-1825 (1991); Wis. Stat. Ann. §§ 71.87 through 71.90 (West 1989).

statutes mandate payment of a refund if it is determined that the tax was erroneously or illegally exacted.<sup>17</sup>

States have adopted combinations of these various procedures in an effort to give their taxpayers adequate due process, while at the same time preserving the states' significant interests in certainty and predictability of their tax revenues, in ensuring compliance with state tax laws, and in preventing frivolous claims.

**B. The Court should defer to the states' authority to establish their own systems and should not dictate that each state's system include or exclude specific components to satisfy federal due process.**

In view of the great diversity and complexity of individual states' established procedures for challenging state taxes, this Court should, consistent with its prior holdings in *McKesson*, *American Trucking Ass'ns v. Smith* and *Harper*, continue to allow each state the freedom to craft its own pre- and post-deprivation remedies within the broad parameters of federal due process. Such a holding would not deny due process to taxpayers, but would allow the states the flexibility to work within existing statutory frameworks and conserve limited administrative resources without imposing rigid procedural requirements.

<sup>17</sup> See, e.g., N.M. Stat. Ann. § 7-1-26 (Michie 1993) (refunds mandatory); Va. Code Ann. § 58.1-1826 (1991) (court granted discretion to determine remedy).

A ruling in this case imposing specific procedural requirements would create an unmanageable administrative burden, engender confusion and uncertainty, call into question each state's existing procedures, and possibly force states to hold special legislative sessions to modify their current statutory procedures. As this Court has consistently held, as long as a state's procedures meet the minimum requirements of federal due process, it does not matter which specific procedures the state's legislature has chosen.

**IV. Federal Law Does Not Necessarily Require States that Do Not Provide Adequate Pre-Deprivation Procedures to Provide Refunds of Illegally Assessed Taxes.**

Petitioner, and the amici supporting Petitioner, refuse to hear this Court's repeated reminders to tax litigants that state law ultimately may play the determinative role in resolving questions of remedy.<sup>18</sup> Rather, Petitioner attempts "to buttress [his] claim" for refunds under state law by reference to statements in *McKesson* regarding

<sup>18</sup> This refusal to listen is evident in the briefs filed in this case. In his Petition for a Writ of Certiorari, Petitioner presented two questions, the first relating to the Georgia Supreme Court pre-deprivation procedures ruling and the second relating to the Georgia Supreme Court post-deprivation refund ruling. The Court granted certiorari on the first question only. Although Amicus Committee of State Taxation ("COST") is the only one to admit it (Brief of Amicus COST at 9), Petitioner, Amicus Tax Executives Institute ("TEI"), and Amicus COST present to this Court arguments relating solely to the second question. See Brief of Petitioner at 26-29, Brief of Amicus TEI at 3-23, Brief of Amicus COST at 9-12.

federal remedial law. *Beam*, 111 S. Ct. at 2448. The Court rejected a similar attempt by the petitioner in *Beam*, reiterating its "repeated[ ] observ[ation]" that "federal 'issues of remedy . . . may well be intertwined with or their consideration obviated by, issues of state law.'" *Id.*, quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984).

Petitioner continues to distort the holdings of this Court by arguing that, 'cause Georgia's pre-deprivation procedures are inadequate, federal law requires Georgia to refund the taxes illegally assessed. This argument is wrong. Federal law does not "obviate" state remedial law.<sup>19</sup> A ruling by this Court that a state's pre-deprivation procedures fail to satisfy due process does not mean that, under federal law, the state must, therefore, refund all illegally assessed taxes, regardless of the circumstances present in each particular case.

It is clear that, as with a pre-deprivation remedy, a state may place various procedural requirements on taxpayers seeking a post-deprivation remedy. See *Beam*, 111 S. Ct. at 2448 (noting that "[n]othing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law"); *McKesson*, 496 U.S. at 45 (states may enact procedural pre-conditions to obtaining refunds, such as requiring payment under protest). And, even if a taxpayer complies with such preconditions,

<sup>19</sup> This Court should disregard Amicus TEI's broad, unsupported, accusatory imputation of bad faith to all state governments as well as its suggestion that the time has come for the Court to usurp the states' power to fashion remedies. See Brief for Amicus TEI at 10-11, 16-21.



federal due process does not mandate retroactive remedial relief in every case. See *Harper*, 113 S. Ct. at 2537 (no "constitutional absolute" that prohibits states from confining a taxpayer "deprived a predeprivation remedy" to prospective relief) (O'Connor, J., dissenting); *Beam*, 111 S. Ct. at 2448 (litigants may assert and courts may consider equitable and reliance interests of parties in determining remedial issues); *American Trucking Ass'ns v. Smith*, 496 U.S. at 215 (equitable considerations may be taken into account in determining what relief is appropriate in any given case) (Stevens, J., dissenting); *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (equitable considerations are relevant in determining relief that is appropriate in any given case) (Harlan, J., concurring).<sup>20</sup> Even if the Court concludes here that Georgia's pre-deprivation process is inadequate to satisfy federal due process, whether either federal law or state law mandates remedial relief in this case, and what form any remedial relief might take are issues for another day. Those issues are not presented in this case and will not be resolved by the decision in this case.



<sup>20</sup> The facts in this case are clearly distinguishable from those in *McKesson*, in which the Court held that the state knowingly imposed an unconstitutional tax. Because there was no basis for the state's good faith reliance on the validity of its statute, the Court found the state's equitable arguments insufficiently "weighty" to support a decision to withhold the remedy. 496 U.S. at 45.

## CONCLUSION

For the reasons stated, this Court should affirm the holding of the Georgia Supreme Court that Georgia's pre-deprivation procedures afforded Petitioner an opportunity adequate under the Due Process Clause to challenge the contested taxes before paying them.

Respectfully submitted,

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